

1 (The jury is not present.)

2 THE COURT: What Farber exhibits are we
3 talking about?

4 MR. McDONALD: Your Honor, we're talking
5 about --

6 MR. ROBERTSON: May we just maybe excuse the
7 witness for this argument?

8 THE COURT: What does he have to do with the
9 Farber exhibits?

10 MR. ROBERTSON: All right.

11 THE COURT: Anything?

12 MS. ALBERT: No.

13 THE COURT: Okay.

14 MR. ROBERTSON: Thank you.

15 MR. McDONALD: We're talking about
16 Plaintiff's Exhibits 326, 327, 328, 329, 330 and also
17 325. These are all mostly articles and then one
18 research report.

19 THE COURT: 325 through 330.

20 MR. McDONALD: Right. And these were
21 proffered --

22 THE COURT: They are articles on what?

23 MR. McDONALD: About ePlus' settlements with
24 Ariba and SAP.

25 THE COURT: You mean like newspapers

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1 articles?

2 MR. McDONALD: Yeah, that came out in like a
3 website IT management, eWeek, things like that. A
4 number of these were ones where the Court had reserved
5 admission because we had objected to them at the
6 pretrial conference pending laying a foundation.

7 So I'd like to address those at this point
8 because we don't think they've got a foundation, and
9 there are also some other problems now that we're at
10 where we're at in the case that I'd like to show why
11 these shouldn't come in.

12 THE COURT: This is something that really
13 takes a long time, and I really wish -- y'all knew
14 about this. You should have told me about it. I
15 would have come in early today and we would have
16 gotten it straight.

17 All right. What is it?

18 MR. McDONALD: Well, basically, you can take
19 two groups of them; 326 through 330.

20 THE COURT: Does anybody have copies of them
21 so I can look at them?

22 MR. McDONALD: Sure.

23 THE COURT: They are admitted, Mr. Robertson.
24 They are offered for purposes of notice; is that
25 right?

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1 MR. ROBERTSON: Notice and intent to induce,
2 Your Honor, but Mr. Strap is going to be addressing
3 this issue since he's been dealing with it, but yes,
4 sir.

5 MR. McDONALD: Are these actually admitted
6 yet? Your Honor, these were not admitted yet.

7 MR. STRAPP: Your Honor --

8 THE COURT: They want them in. Let me hear
9 why they want them in first. Come up, Mr. Strap.
10 Just leave your stuff there, Mr. McDonald. Don't take
11 any of his stuff away when you leave, Mr. Strapp.

12 Well, I have two copies of 326 and one copy
13 of 327. Do we have the rest of them?

14 MR. McDONALD: Yes.

15 MR. STRAPP: Your Honor, you may recall we
16 argued about these particular exhibits --

17 THE COURT: Let's just get into why they are
18 offered.

19 MR. STRAPP: We're offering them to show
20 notice of the patent, which is relevant to indirect
21 infringement both to inducing infringement as well as
22 contributory infringement. And at the pretrial
23 conference Your Honor said that these are admissible
24 subject to a proper foundation being laid, and
25 specifically you said at the pretrial conference to

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1 the extent we can show that Lawson subscribes, quote,
2 subscribes to or read or otherwise kept abreast of
3 these types of publications, then they would be
4 admissible at the trial to show notice for indirect
5 infringement.

6 And we believe, Your Honor, that the
7 foundation has been laid.

8 THE COURT: How did it get laid?

9 MR. STRAPP: First --

10 THE COURT: I don't think anybody asked about
11 supply chain, demand chain, executives. This
12 newspaper article in 327, what is that? *IT*
13 *Management, Info World* or the *New York Times*, and I
14 guess this is *Computer World*. Nobody testified to
15 anybody of that.

16 MR. STRAPP: Let me start specifically with
17 respect to PX 325. That's the Gartner report.

18 THE COURT: I don't have that. Nobody gave
19 me that.

20 MR. McDONALD: That's in a separate group,
21 Your Honor. That's why I didn't hand that up yet.

22 THE COURT: We're talking about the articles
23 now. Nobody has ever laid a foundation yet that
24 anybody on ePlus' side ever saw these articles.

25 MR. STRAPP: The way Your Honor ruled at the

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1 final pretrial conference was that if we could
2 demonstrate that the Lawson witnesses generally
3 subscribe to these types of publications and keep
4 abreast of developments and trends in the industry,
5 then --

6 THE COURT: That in a nickel will get you a
7 Coke. I'm talking about these publications. Nobody
8 showed that they regularly subscribed to these
9 publications, did they?

10 MR. STRAPP: Specifically to the Gartner
11 publication --

12 THE COURT: We're not talking about the
13 Gartner. We're talking about the articles 326 through
14 330.

15 MR. STRAPP: Mr. Lohkamp said he keeps
16 abreast of industry developments. He reviews articles
17 in general news publications. He reviews industry
18 publications on the supply chain management industry.
19 That was Mr. Lohkamp's testimony during trial
20 yesterday.

21 So we would submit that the foundation as to
22 these general news publications, supply chain
23 management industry publications and articles of which
24 these are a subset, the foundation has been laid
25 through --

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1 THE COURT: Do you have any evidence that
2 anybody at Lawson ever saw any one of these articles?

3 MR. STRAPP: Your Honor, we don't have any
4 direct evidence. We're putting this in to show
5 circumstantial evidence, which under the case law --

6 THE COURT: I understand circumstantial
7 evidence very well. But even then if you're offering
8 this for -- what have you is, A, this is hearsay. I
9 think they objected to it as hearsay. You've got to
10 get it in. You were saying it comes in for a
11 nonhearsay purpose, i.e., notice and intent to
12 infringe, right?

13 MR. STRAPP: Correct.

14 THE COURT: Okay. So if you don't show that
15 they ever got these, saw these, or read these, how can
16 that nonhearsay purpose be satisfied?

17 MR. STRAPP: It's to show circumstantial
18 evidence of knowledge of the patent, which is relevant
19 to the inducing infringement.

20 THE COURT: All right. Thank you. Objection
21 to 326 through 330 is sustained, A, because it's
22 hearsay, and it doesn't fall within an exception, and,
23 B, because there's no foundation that anybody at
24 Lawson ever saw any of them.

25 Now, let me see the Gartner thing. Just tell

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1 me what Gartner is.

2 MR. STRAPP: That's DX 325, Your Honor.

3 THE COURT: The man said he read Gartner and
4 kept up with it regularly.

5 MR. STRAPP: Correct. Actually, we had
6 testimony from three different Lawson witnesses who
7 all testified they subscribed to and reviewed Gartner
8 industry analyst reports.

9 Again, they not for the same purposes of
10 these other articles. And Your Honor ruled at the
11 pretrial conference it would be admissible to show
12 notice --

13 THE COURT: There's no indication that
14 anybody saw this particular one, is that their
15 objection?

16 MR. STRAPP: That may be their objection, but
17 I think that objection in light of the testimony
18 that's come in, there's been proper foundation laid
19 through three separate Lawson witnesses.

20 THE COURT: All right. Let me hear from
21 them.

22 Why can't this come in for the purpose of
23 notice of the ePlus patents and intent to infringe?

24 MR. McDONALD: A couple of reasons, Your
25 Honor. One, the testimony was that Mr. Lohkamp, I

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1 believe, specifically said he'd see Gartner reports
2 from time to time, but that doesn't mean that every
3 report from Gartner is something that he would
4 receive. He would receive certain ones that they
5 would actually download.

6 You'll see from this article that it's got an
7 ePlus production number. We produced millions of
8 documents in this case, including other Gartner
9 reports and scoured the Lawson electronic files for
10 all Gartner reports. This is not one of the reports
11 that Lawson downloaded.

12 Mr. Lohkamp was not asked about this report
13 directly. So --

14 THE COURT: Well, I think the foundation has
15 been laid for this, but the problem, what I'm trying
16 to figure out is, and I think it passes the nonhearsay
17 purpose because it does put them on notice if there's
18 something in here that links ePlus and what was going
19 on in this text to something Lawson was doing. Is
20 there?

21 MR. McDONALD: There's nothing like that,
22 Your Honor.

23 THE COURT: Do you know what they contend?
24 I've read it now, what they contend links it. Do you?

25 MR. McDONALD: Well --

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1 THE COURT: Do you know what they contend
2 provides the notice? That is, what text is it that
3 provides the notice? Let's assume he gets Gartner
4 because he said he did. You get it. You read it. Is
5 there anything in here that puts you on notice? You
6 can't just put out the fact of a settlement. So do
7 you know what it is?

8 MR. McDONALD: I believe it's basically
9 what's on the top of page 2, Your Honor.

10 THE COURT: What is it that provides the
11 notice, Mr. Strapp?

12 MR. STRAPP: Your Honor, that is one portion
13 of the document --

14 THE COURT: Tell me the words.

15 MR. STRAPP: The first sentence. On
16 February 14, 2005, Ariba and ePlus settled a patent
17 infringement lawsuit involving electronic procurement
18 systems that search, check inventories, and perform
19 other functions. Ariba agreed to pay ePlus \$37
20 million during the first quarter of 2005 to settle the
21 case.

22 And then if you skip down to the next
23 paragraph, there's a little bit more information about
24 these patents. Talks about how ePlus' Software and
25 Services Company bought two patents from

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1 Fisher-Scientific.

2 Third one was developed. And it explained a
3 little bit more information about the law suit, the
4 finding of willful infringement. And then in the
5 second segment of the document there's an analysis
6 about how this finding might affect other companies in
7 the software --

8 THE COURT: Tell me the text. That's your
9 view of it. Your view of it is irrelevant to what put
10 them on notice. It's the text that puts them on
11 notice.

12 MR. STRAPP: If I could direct Your Honor's
13 attention to the second full paragraph in the analysis
14 section beginning, This settlement is good news."

15 The second sentence in that paragraph says,
16 "The settlement may, however, harm many independent
17 software vendors, ISVs, which face high legal costs to
18 investigate patent and product delays if patent
19 troubles arise.

20 Finally, the last part of this document talks
21 about recommendations for those independent software
22 vendors.

23 THE COURT: All right. Now I know.

24 Why doesn't that put them on notice that they
25 better go look at the ePlus patents and see what's

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1 going on?

2 MR. McDONALD: Because it doesn't say that.
3 The closest thing that Mr. Strapp read is that the
4 settlement may, however, harm many independent
5 software vendors which face high legal costs to
6 investigate patent and product delays if patent
7 troubles arise.

8 So what this is saying is what might happen
9 is you might have some patent troubles. It doesn't
10 give them notice that they have already got patent
11 troubles. It says, Watch out. There might be a car
12 accident later.

13 THE COURT: All right. Thank you.

14 MR. McDONALD: The other aspects of this,
15 Your Honor, on the notice issue, I would just note
16 that this record actually is pretty clear at this
17 point. The Lawson people have acknowledged they knew
18 about the patent, at least by May of 2009, when they
19 got sued under these patents.

20 THE COURT: So what?

21 MR. McDONALD: Well, they have now satisfied
22 the notice prong of whatever they're trying to prove
23 with respect to intent so why do we need to have this
24 sort of prejudicial information --

25 THE COURT: So you stipulate all notice

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1 issues have been proved in the case?

2 MR. McDONALD: Not all notice issues, but my
3 understanding is they were trying to prove that we
4 knew about the patents with this article. That's been
5 something we've already had testimony --

6 THE COURT: What other notice issue is there
7 other than that you knew about the patents?

8 MR. McDONALD: I don't think they're trying
9 to contend there's anything else.

10 THE COURT: So you stipulate then that notice
11 has been proved?

12 MR. McDONALD: Yes.

13 THE COURT: Notice of the patents as of when?

14 MR. McDONALD: May of 2009.

15 THE COURT: Okay. Thank you.

16 Anything else, Mr. Strapp?

17 MR. STRAPP: Your Honor, they have asserted a
18 good faith defense. They said even though they had
19 notice as of May 2009, they immediately developed good
20 faith defenses as part of their litigation analysis.

21 THE COURT: They developed good faith
22 defenses?

23 MR. STRAPP: That's what their argument is to
24 indirect infringement.

25 THE COURT: Developing good faith defenses

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1 doesn't do anything. It's whether you have good faith
2 to continue in the use of the patent. Isn't that what
3 the issue is?

4 MR. STRAPP: That's correct, Your Honor.

5 THE COURT: That's different than developing
6 good faith defenses. That and a nickel will get you a
7 Coke. That means you're developing litigation
8 strategy.

9 MR. STRAPP: Your Honor, they claim that they
10 have good faith defenses, and, therefore, they don't
11 have the requisite intent even though they had
12 knowledge as of 2009. To the extent that this can
13 show or indicate that they had knowledge prior to May
14 2009, then their argument on good faith defenses goes
15 out the window.

16 THE COURT: All right. Thank you very much.
17 Anything else?

18 MR. McDONALD: No, Your Honor.

19 THE COURT: The objection to PX 325 is
20 overruled, but it will have to be redacted to take out
21 the dollar amount. The dollar amount is irrelevant to
22 the notice issue, I think.

23 MR. ROBERTSON: It is, Your Honor. It's
24 going to be relevant later in the case when Mr. Farber
25 testifies on invalidity about commercial success, and

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1 Your Honor has already ruled that's admissible, but we
2 can redact it for purposes of this morning.

3 THE COURT: All right.

4 MR. McDONALD: I forgot the mention, Your
5 Honor, there were some other issues. In fact, there
6 were some agreed sections to be redacted. Do you have
7 a copy with the blue box --

8 THE COURT: No, I don't have anything.

9 MR. McDONALD: Can I hand up a copy of that?

10 THE COURT: If you-all have agreed, I don't
11 need to deal with it.

12 MR. McDONALD: There is a section we didn't
13 agree on. And I hear Mr. Robertson saying that
14 they'll take the dollars out, but the dollars are
15 still in there at this point.

16 One way to do this might be to talk to the
17 witness --

18 MR. ROBERTSON: Your Honor --

19 THE COURT: Stop talking all at the same
20 time. Ms. Daffron is good, but neither she, nor I,
21 can hear all three of you. Please.

22 What is it that I need to rule on here on the
23 redaction that you all don't agree on?

24 MR. STRAPP: Your Honor directed ePlus at the
25 final pretrial conference to redact the portions of

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1 the document that don't deal with notice. So we've
2 agreed to do. There was a dispute about which
3 portions go to notice and which portions do not go to
4 notice.

5 We believe most of the document does deal
6 with this notice issue, which is why we're introducing
7 the evidence. We've agreed to redact the last few
8 bullet points here that talk about recommendations on
9 what to do for independent software vendors. And we
10 will also agree to redact the \$37 million figure. I
11 think with that, that should resolve the redaction
12 issue.

13 THE COURT: All right. But you're not
14 offering it then in response to their good faith
15 defense?

16 MR. STRAPP: We're offering it to show --

17 THE COURT: Well, then the recommendations
18 don't have anything to do with the good faith defense.
19 Is that what you're saying?

20 MR. STRAPP: They do, Your Honor.

21 THE COURT: I'm afraid you're talking about
22 two different versions of the document is what I'm
23 trying to get at. I hear you saying two different
24 things in your argument and I don't understand it. E.

25 MR. STRAPP: Your Honor, in light of your

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1 ruling, I think that we have fair direction that this
2 comes in for notice, it's relevant to show that there
3 was no good faith defense, and that \$37 million should
4 be redacted because that's not relevant to any of the
5 infringement issues. That's a clear ruling. We can
6 follow it. We will redact it. When we put it on in
7 front of Mr. Farber, we will have the \$37 million
8 redacted.

9 THE COURT: I don't think the rest of it is
10 necessarily related to notice, but it does relate to
11 good faith defense.

12 MR. STRAPP: The third page of the document
13 doesn't have any relevance to issues in this case.

14 THE COURT: I'm talking about recommendations
15 for ISVs.

16 MR. STRAPP: Right.

17 MR. McDONALD: Just to be clear, the first
18 page we have in the red box there, some materials that
19 this could spark more patent lawsuits. This is the
20 sort of thing that goes beyond --

21 THE COURT: No. Listen, if there's anything
22 that should get a company's attention is whether or
23 not they're going to get a lawsuit. Come on.

24 The \$37 million comes out, and then what
25 ePlus originally sought and all that stuff comes out.

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1 It doesn't make any difference.

2 MR. McDONALD: So that will be the first
3 paragraph on page 1, the first paragraph on page 2 --

4 THE COURT: Not the paragraph. The figure
5 \$37,000. Just say "a settlement." And 37 million is
6 out. And then a patent infringement settlement, blah,
7 blah, blah.

8 On the second page, ePlus originally sought
9 up to \$98 million in damages in an injunction against
10 infringement. That comes out. The rest of it stays
11 in except for the last page. That's around the blue
12 box, Recommended reading and related research.

13 All right. Let's get the jury.

14 MR. ROBERTSON: Your Honor, at the risk of
15 incurring the wrath of the Court, there are two things
16 --

17 THE COURT: Would you quit saying that? You
18 haven't been subjected to any wrath. Just because
19 somebody expresses irritation doesn't mean wrath.

20 MR. ROBERTSON: I just wanted to follow-up on
21 two requests, Your Honor.

22 THE COURT: Does it have to do with
23 Mr. Farber?

24 MR. ROBERTSON: No, sir.

25 THE COURT: Well, then I don't want to deal

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1 with it.

2 MR. ROBERTSON: You asked for us in the
3 morning session to get this information for you.

4 THE COURT: I'll get it, but I don't want to
5 intrude on the jury's time. I'll get it at the lunch
6 break. I'll give you all the time you want on your
7 time, not theirs.

8 MR. ROBERTSON: Thank you, Your Honor.

9 THE COURT: Did you hone that down to less
10 than 10 minutes?

11 MS. STOLL-DeBELL: No, I whittled it way
12 down, Your Honor.

13 THE COURT: Is it 9.2?

14 MS. STOLL-DeBELL: More like one minute or
15 two minutes. So breaks are good.

16 THE COURT: I like the way you whittle
17 because the last time you whittled it to zero.

18 MS. STOLL-DeBELL: I try.

19 (The jury is present.)

20 THE COURT: All right. Ms. Stoll-DeBell.

21

22 BY MS. STOLL-DeBELL: (Continuing)

23 Q Hello, Mr. Niemeyer.

24 A Hello.

25 Q I have just a few remaining questions for you.

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1 You testified that you've looked at I think it was six
2 different functions of Lawson's products; keyword
3 search, catagory search, shopping cart, requisition
4 generation, purchase order generation, and Punchout?

5 A Yes.

6 Q Did I get that list correct?

7 A Those are the items I mentioned, yes.

8 Q Was it ePlus' lawyers who asked you to look at
9 those functions?

10 A They asked me to investigate that functionality of
11 the product, yes.

12 Q Now, isn't it true that you're charging ePlus \$250
13 per hour to work on this lawsuit for them?

14 A Yes, that's correct.

15 Q How much in total have you charged them for your
16 work on this case?

17 A I would guess it was somewhere around \$75,000.

18 MS. STOLL-DeBELL: Thank you. I have no
19 further questions.

20

21 REDIRECT EXAMINATION

22 BY MS. ALBERT:

23 Q Mr. Niemeyer, was it necessary to review all of
24 the source code relevant to the Lawson system
25 foundation in order for you to formulate your opinions

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1 about the functionality of these six different
2 features that you were asked to investigate?

3 A No, it was not. I was able to determine the
4 relevant source code and review what was necessary to
5 understand those functions.

6 Q Was it necessary to review all of the source code
7 relevant to the inventory control module in order to
8 render your opinions about the functionality of the
9 features that you investigated?

10 A No. Again, I was able to determine which subset
11 was necessary for review.

12 MS. ALBERT: Mike, could we have slide 86
13 back, please.

14 THE COURT: Slide what?

15 MS. ALBERT: 86.

16 THE COURT: Is that this one?

17 MS. ALBERT: I'm sorry.

18 THE COURT: You didn't get to this because he
19 hadn't seen it before except there was a different
20 version of it with the blue stacked on top, and I
21 sustained the objection.

22 MS. ALBERT: Slide 85. I'm sorry. My
23 eyesight is going. Sorry.

24 BY MS. ALBERT:

25 Q Now, are all of the tables illustrated in your

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1 demonstrative here included within the item master
2 database?

3 A Yes, they are.

4 Q Is there a field for vendor name in one of the
5 tables within this database?

6 A I believe the POITEMVEN table includes a field for
7 vendor name.

8 Q What tables of the item master database are
9 indexed for keyword searching?

10 A My understanding is that the ITEMMAST table, the
11 POITEMVEN table, and the ITEMLOC table.

12 Q You mentioned these user defined fields in the
13 ITEMMAST table. Can you explain what these user
14 defined fields are?

15 A Yes. These are sort of like empty slots or empty
16 spaces left in the table, which can be filled in with
17 data determined by the user. So there's some extra
18 storage space that the user can fill with data of
19 their choosing, and those fields can be indexed for
20 search within the Lawson system.

21 Q So can a user put any type of data that they want
22 into one of these user defined fields?

23 A Yes, they could.

24 Q Would a vendor name be a type of data that a user
25 could put into one of these user defined fields?

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1 A Yes.

2 Q Can these user defined fields be enabled for
3 keyword searching?

4 A Yes, they can.

5 MS. ALBERT: Thank you. I have nothing
6 further.

7 THE COURT: You need Mr. Niemeyer back in
8 your rebuttal?

9 MR. ROBERTSON: I don't think so, Your Honor,
10 but I'd like to reserve on that.

11 THE COURT: All right, Mr. Niemeyer, they may
12 need you back later in the case. So you're excused
13 temporarily so long as you agree to come back when
14 they notify you that you need to come back. Do you
15 agree to do that?

16 THE WITNESS: Sure.

17 THE COURT: Thank you very much. You're
18 excused temporarily. Thank you.

19 THE WITNESS: Thank you, Your Honor.

20 (The witness was excused from the witness
21 stand.)

22 THE COURT: Next witness.

23 MR. STRAPP: EPlus calls as its next witness
24 Mr. Farber.

25 THE COURT: All right.

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1

2 KENNETH G. FARBER, called by the Plaintiff, first
3 being duly sworn, testified as follows:

4

5 DIRECT EXAMINATION

6 BY MR. STRAPP:

7 Q Would you please state your name for the record?

8 A Kenneth G. Farber.

9 Q Please describe where you're presently employed.

10 A I'm presently employed at ePlus, Incorporated.

11 Q What's your position at ePlus?

12 A I'm the president of ePlus Systems and Content
13 Services.

14 Q How long have you been in that position?

15 A About 10 years now.

16 Q Was that your first position at ePlus?

17 A Yes, it was.

18 Q How did you come to work at ePlus?

19 A I worked at a company called ProcureNet that sold
20 some of the assets of that company to ePlus. So I
21 joined ePlus following that acquisition.

22 Q What was the business of ProcureNet, the company
23 you worked at before ePlus?

24 A The component business that I worked at,
25 ProcureNet, dealt with sourcing and catalog management

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1 related applications that we've been hearing about
2 over the last week or so.

3 Q Can you tell me just briefly about your
4 professional experience in the computer science
5 industry?

6 A I've been in the field a little over 30 years.
7 About 32 years now.

8 Q What types of jobs have you held in the field?

9 A I've held everything from -- I started out as a
10 computer operator. I went into systems programming.
11 So I programmed in a number of different application
12 languages. Managed development staffs. Did
13 statistical analysis on computer performance. Ran
14 marketing organizations, sales organizations, and just
15 kind of moved up the ranks of the field.

16 Q When did you join ProcureNet?

17 A I joined ProcureNet roughly -- I think it was
18 around 2000.

19 Q What was your position at ProcureNet?

20 A Senior vice president.

21 Q How long did you work there at ProcureNet?

22 A I think it was just under a year before the
23 acquisition.

24 Q So is it true then that ePlus acquired
25 ProcureNet's business in 2001?

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1 A Yes, that would be correct.

2 Q What specific portions or assets of ProcureNet's
3 business were acquired by ePlus in 2001?

4 A They acquired the procurement and catalog systems.
5 All the associated things that would go with that such
6 as the documentation. They acquired the patents that
7 we've been talking about that are in dispute here.

8 And they also acquired the people that were associated
9 with those applications.

10 Q How many employees from ProcureNet joined ePlus as
11 part of the acquisition?

12 A Mid thirties, 35 or 38 or so.

13 Q Do any of those employees from ProcureNet still
14 work at ePlus?

15 A For the most part, they all work at ePlus with the
16 exception of a couple that have since retired.

17 Q Have you been continuously employed by ePlus since
18 you joined after the acquisition of ProcureNet?

19 A I have.

20 Q To whom do you report at ePlus?

21 A I report to the CEO, Phillip Norton.

22 Q You mentioned that you are the president of ePlus
23 Systems and ePlus Content Services; is that correct?

24 A Yes.

25 Q Can you describe the businesses of those divisions

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1 of ePlus?

2 A Sure. Those divisions are responsible for
3 developing, supporting and selling applications that
4 are involved in the procurement and catalog management
5 fields.

6 Q What are the primary software products that are
7 developed and sold by ePlus Systems and ePlus Content
8 Services?

9 A They are referred to as Procure Plus and Content
10 Plus.

11 Q Can you just give us a brief high level overview
12 of Procure Plus and Content Plus?

13 A Sure. The products work in conjunction with one
14 another, and it provides the ability for our customers
15 and end users to be able to select items from multiple
16 vendors from a catalog, compare those items, decide
17 which ones they would like to purchase from vendors,
18 put those items on a requisition, and the system goes
19 through a work flow for corporate approval. Inventory
20 is checked to make sure that the items are available
21 in inventory or if they are backordered, if you will.

22 Then the items are placed -- there's usually a lot
23 of different line items on a requisition that somebody
24 orders. They're not just ordering like a blue pen.
25 They may order different items from different vendors,

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1 and then the system distributes those items once
2 approved from one single requisition that creates
3 multiple purchase orders to the suppliers and vendors
4 that they're ordering from.

5 Q Can you turn, please, to Plaintiff's Exhibit 448
6 in your binder in front of you?

7 A Okay.

8 MR. McDONALD: I'm going to object to this
9 line of questioning to the extent it goes into any
10 detail about the ePlus products because that's not
11 really relevant to the infringement issue because it
12 compares the Lawson products to the patent.

13 MR. STRAPP: Your Honor, I don't intend to go
14 into any detail about the products.

15 THE COURT: Why are you offering it?

16 MR. STRAPP: It will become apparent in
17 the --

18 THE COURT: Can you make it apparent now in a
19 word?

20 MR. STRAPP: Yes. The bottom right-hand
21 corner of the document, list the patents, I want to
22 demonstrate that these products are marked with the
23 patents that are in suit in this case.

24 THE COURT: All right.

25 MR. McDONALD: That's not an issue in the

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1 case anymore, Your Honor.

2 MR. STRAPP: Marking goes to constructive
3 knowledge of the patents, which is relevant to the
4 issue we just discussed.

5 MR. McDONALD: It is not relevant to notice
6 to Lawson. It's just general public marking. That is
7 not appropriate.

8 MR. STRAPP: Your Honor, the witness will
9 testify that the various products are marked, and we
10 have testimony from Lawson witnesses that they have
11 seen those products at trade shows back as far as
12 2003. That information is relevant to knowledge.

13 MR. McDONALD: The Lawson people have already
14 testified. They never testified to that.

15 THE COURT: I think one of them testified
16 that he went to a trade show and looked at their
17 products.

18 MR. McDONALD: He said he saw the booth, but
19 they never saw the products or any patent markings.

20 THE COURT: He says there's no foundation
21 because you haven't established that they actually
22 looked at the products that have the marking.

23 MR. STRAPP: Your Honor, first of all,
24 circumstantial evidence is relevant to indirect
25 infringement.

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1 Secondly, we believe there is direct evidence
2 that we have established through Mr. Lohkamp's
3 testimony.

4 And third, under the case law --

5 THE COURT: Evidence of what?

6 MR. STRAPP: That Lawson employees knew of
7 ePlus, that they have seen ePlus --

8 THE COURT: Somebody said they knew about
9 ePlus, but that's not the point. The point is did
10 they see these patents or these products that had the
11 notice of the patent on them.

12 MR. McDONALD: Mr. Lohkamp's testimony about
13 seeing ePlus at the trade show was in 2003 before he
14 even worked for Lawson. So there's no evidence that a
15 Lawson employee saw that.

16 MR. STRAPP: Your Honor, there's evidence
17 that Lawson has known of ePlus. There's
18 circumstantial evidence at least that Lawson knows
19 that ePlus competes in this particular marketplace.
20 EPlus marks its website, its software, and under the
21 case law, marking is evidence of constructive
22 knowledge of the patents, which can be relevant to
23 indirect infringement.

24 THE COURT: Yes, it is. But do you
25 understand the concept of linkage, foundation?

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1 MR. STRAPP: Yes, Your Honor.

2 THE COURT: Well, do you have it?

3 MR. STRAPP: We have testimony from Lawson
4 employees that they have known of ePlus. We have
5 testimony from a Lawson employee that he attended a
6 trade show in which ePlus had set up a booth
7 demonstrating --

8 THE COURT: But he says that's before he even
9 was an ePlus employee. Is that right?

10 MR. McDONALD: Lawson.

11 THE COURT: I mean a Lawson employee. Is
12 that right?

13 MR. STRAPP: I don't know the answer to that
14 one way or the other, Judge.

15 THE COURT: Isn't that something you need to
16 know to establish the foundation.

17 MR. STRAPP: Well, Your Honor, I believe
18 under the case law, even if we don't have direct
19 evidence, circumstantial evidence is sufficient to at
20 least go to the jury so that they can consider whether
21 or not there is sufficient evidence for the indirect
22 infringement claim.

23 THE COURT: All right. Anything else?

24 MR. McDONALD: No, Your Honor.

25 THE COURT: Objection overruled. The

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1 exhibits and testimony right now is admitted for the
2 limited purpose of whether or not Lawson may have
3 knowledge of ePlus and their patents. EPlus as a
4 competitor and their patents.

5 BY MR. STRAPP:

6 Q Mr. Farber, can you just tell me briefly what this
7 document is?

8 A Sure. This is a document, which I believe
9 describes at a high level a little bit about the
10 functionality and features of the Procure Plus
11 product.

12 Q Can I direct your attention to the bottom
13 right-hand corner of the first page of this document?

14 A Yes.

15 Q Do you see there a list of U.S. patent numbers?

16 A I do.

17 Q Do you recognize any of those patents numbers as
18 patents that are at issue in this case?

19 A Yes.

20 Q Are those the first three patents listed there?

21 A Yes, they are.

22 Q Can you explain to me why it is that ePlus has
23 decided to mark this particular Procure Plus brochure
24 with the three patents numbers that are at issue in
25 this case?

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1 A Well, it's my understanding from working with our
2 counsel that when you have a patents marking, it is a
3 necessity, and it's a form of providing general notice
4 to the industry that you have patents.

5 So we mark things that are publicly disseminated.

6 Q Let me ask you to turn to Plaintiff's Exhibit 417,
7 please. What is this document, Mr. Farber?

8 MR. McDONALD: For the record, I have the
9 exact same objections. I think I know what you're
10 going to say, but I just want to make sure you know I
11 have the same objections to this one.

12 THE COURT: Are these the same kind of
13 documents, it's just another kind of product?

14 MR. STRAPP: Correct. We've discussed --

15 THE COURT: Is that what it is?

16 MR. McDONALD: Yes, it is, Your Honor, and I
17 guess you did have a limiting instruction. So I'd at
18 least request the same limiting instruction.

19 THE COURT: Well, this Exhibit 417 and this
20 testimony is, again, limited to -- for you to consider
21 as evidence respecting whether Lawson is on notice of
22 ePlus as a competitor and its patents that are at
23 issue in this case. That's the only purpose that this
24 is admitted to.

25 BY MR. STRAPP:

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1 Q Mr. Farber, this is Plaintiff's Exhibit 417?

2 A It's a similar document and brochure that shows up
3 in written form and on the website that relates to our
4 product information management solutions.

5 Q Which product specifically does this relate to?

6 A Catalog and Content Plus.

7 Q Can you take a look at the bottom right-hand
8 corner of this document, please?

9 A Yes.

10 Q Do you see there a list of U.S. patent numbers?

11 A I do.

12 Q Do you see the same three U.S. patent numbers
13 listed first there that we had discussed with respect
14 to Plaintiff's Exhibit 443?

15 A Yes.

16 Q I'm sorry, 448.

17 Are these the three patents that are at issue in
18 this lawsuit?

19 A Yes, that's the '683, the '516, and the '172
20 patent.

21 Q What types of additional documents or other
22 documents, if any, does ePlus mark with '683, '516 and
23 '172 patents?

24 A We mark the products themselves so that when
25 people utilize the system, they see the patents as

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1 soon as they login. Anybody that goes to our website
2 sees markings at numerous locations on our website.
3 Our printed materials, our documentation, information
4 that we hand out at things like trade shows are also
5 marked. So it's basically we try to mark everything
6 that's publicly disseminated.

7 Q Since when has ePlus marked its products and its
8 literature?

9 A I think that was since 2002, if I'm not mistaken.

10 Q What types of customers does ePlus target for
11 these Procure Plus and Content Plus products?

12 A In terms of who we try to attract and sell to, I
13 would say the mid market.

14 Q What do you mean by "mid market"?

15 A Well, similar type customers that Lawson, you
16 know, talked about earlier in the week. You know,
17 they're not necessarily the largest. They're not
18 necessarily the smallest. They fall within a range.
19 It can be, you know, a company that may be in revenue,
20 does, you know, 50 million to 2 1/2 billion. That's a
21 very wide range, but that's what's considered mid
22 market in industry terms.

23 Q Do you know whether or not ePlus competes with
24 Lawson for sales of its e-Procurement software?

25 A Yes.

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1 Q How do you know that ePlus competes with Lawson?

2 A Well, I know through personal conversations that I
3 have with prospects and meetings that I attend, sales
4 meetings with my sales executives or account
5 representatives that are meeting with prospects to try
6 to sell them a solution.

7 Q Any other ways that you know?

8 A Yeah. That's one way. Other ways, through emails
9 at times that, you know, these prospects would send to
10 my sales organizations that I get copied on. And
11 sometimes in situations where you're on a conference
12 call, you know, with a lot of vendors, you know, and
13 the prospect that's looking to buy a solution would
14 generally ask some general questions so that, you
15 know, they give the benefit to all the vendors to hear
16 the answer.

17 And sometimes there may be occasion to hear of a
18 competitor situation that way as well.

19 Q Like the Lawson employees we've heard testimony
20 from, do you also pay attention to industry analyst
21 reports?

22 A I do.

23 Q Can you please turn to Plaintiff's Exhibit 463.

24 A 463?

25 Q That's correct.

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1 A Okay.

2 Q Do you recognize this document, Mr. Farber?

3 A Yes.

4 Q What is this document?

5 A This document was published in 2006 by AMR
6 Research and it's entitled, Procurement and Sourcing
7 Applications Report, Market Sizing Series." It's a
8 projection of where vendors are in this field between
9 2005 and 2010.

10 Q Can you tell me, who is AMR Research?

11 A AMR Research is a reputable research firm that
12 since have been acquired by Gartner within the last
13 year, but they were an organization that followed the
14 market and reported on the market.

15 Q Does ePlus subscribe to reports by AMR?

16 A We have, yes.

17 Q Does ePlus subscribe to reports by other industry
18 analysts as well?

19 A Sure.

20 Q Can you turn to page 7 of the document with the
21 Bates numbers 136. Do you see a section there
22 entitled, Procurement?

23 A Yes.

24 Q Is this section describing e-Procurement software
25 like the Content Plus and Procure Plus products that

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1 you just discussed?

2 A Let me just read it real quick.

3 THE COURT: What page are you on?

4 MR. STRAPP: I'm on Bates number ending 136.

5 A At a very, very high level.

6 Q Do you see in the middle this paragraph here AMR
7 is discussing who some of the companies with these
8 types of applications, it has a list of companies with
9 procurement applications, and it states, Companies
10 with procurement applications include Ariba, ePlus,
11 Epicor, Katera, Lawson, Oracle, Quadrem, Isiris
12 Innovations, SAP, SciQuest and Vinimaya.

13 Is that consistent with your understanding of some
14 of the companies that develop and sell e-Procurement
15 software applications?

16 A At this particular time, sure.

17 Q This again was in 2006?

18 A I believe so, yes.

19 Q Let me ask you to turn to the page with the Bates
20 number ending 142 it's. Page 13 of the document.

21 A Okay.

22 Q There's a chart there on this page that is
23 entitled, "Procurement and sourcing vendors ranked by
24 2005 procurement and sourcing revenue (including
25 estimated '06 growth.) Do you see that?

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1 A I do.

2 Q What kind of information do you understand this
3 table -- what is this meant to convey in this table,
4 this information?

5 A I think this is the analyst estimate relative to
6 where they think how large and how small companies are
7 in this space, and they are ranking them according to
8 what the analyst thinks their revenue is.

9 Q This is ranking companies that develop and sell
10 e-Procurement software applications?

11 A That's correct.

12 Q Do you see on this chart that both Lawson and
13 ePlus are mentioned and ranked on this chart?

14 A Yes.

15 THE COURT: What page is it?

16 MR. STRAPP: That's at Bates number ending
17 142.

18 Q Let me ask you, Mr. Farber, what current or
19 potential customers has ePlus directly competed
20 against Lawson for business?

21 A Well, my personal knowledge is Ames Corporation, a
22 company such as Fortress Investments, Sterling
23 Jewelers, Cleveland Clinic, Novant, Wolters Kluwer,
24 just to name a few. I'm sure there are others, but
25 those are the ones that immediately come to mind.

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1 Q Do you recall some testimony earlier this week
2 that on occasion the RFP process that we've heard
3 testimony about can be in confidence and you don't
4 always know as a procurement software company who
5 you're competing against?

6 A Yes, that's very true.

7 Q That's been your experience as well?

8 A It has.

9 Q Have you learned about additional instances of
10 competition between ePlus and Lawson during the past
11 week that you have spent here in court as ePlus'
12 corporate representative?

13 A Yes, coincidentally, that's true.

14 Q What instance of competition was that?

15 A I didn't know that we were competing or
16 potentially competing with Lawson at Deaconess
17 Hospital.

18 Q How did you learn that Lawson is competing with
19 ePlus in Deaconess Hospital?

20 A I saw a document that came up. I don't know if it
21 was an RFP or statement of work or something that came
22 up, and it says Deaconess, and it was around the time
23 frame that we actually lost Deaconess. So I suppose
24 it went to Lawson.

25 Q Is the testimony you have heard generally about

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1 the RFP process from Lawson consistent with your
2 understanding of how the RFP process works for
3 e-Procurement software?

4 A Yes, I believe so.

5 Q When ePlus receives an RFP, does ePlus itself
6 draft a response and ensure that the response that it
7 gives to the RFP is accurate?

8 A Yes, ePlus would draft the response, yes.

9 Q In addition to industry analyst reports, what
10 other types of media or publications do you follow to
11 try to keep abreast of trends or developments in the
12 e-Procurement industry?

13 A In addition, to analysts reports?

14 Q Correct.

15 A There's a lot of sources. You know, we do --
16 besides the reports, you get to have briefings with
17 the analysts. We actually sit down and they disclose
18 some information to you about competition. There's
19 times where we follow -- not times. We do follow a
20 number of different trade magazines. There's web
21 based information such as blogs that are written now
22 in this discipline of procurement sourcing and catalog
23 management.

24 There's the competitors websites that we looked at
25 very often to see what the competitors are doing and

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1 try to gain insight based on whatever public
2 information is available to help us position our
3 products and solutions.

4 Q Do you know whether in these types of publications
5 you've been discussing there's ever been any mention
6 of ePlus or its patents?

7 A Yes.

8 Q What are you referring to specifically?

9 A There have been authors that have written things
10 on blogs, on websites. There have been newspaper
11 articles, trade magazines widely published --

12 MR. McDONALD: Your Honor, we already went
13 through these issues as to foundations for some
14 exhibit that's been excluded. Now he's talking about
15 the same thing. That has been excluded.

16 THE COURT: It sounds to me like it.

17 MR. STRAPP: Your Honor, I wasn't planning to
18 go into any detail about these exhibits or show them,
19 obviously. I was just asking about his personal
20 knowledge as the president of ePlus, what does he do
21 to keep abreast of industry developments.

22 THE COURT: What's that got to do with
23 anything in the case?

24 MR. STRAPP: It's relevant to understanding
25 how the marketplace works and how people in the

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1 industry, including the president of ePlus keeps track
2 of what's going on in the industry.

3 THE COURT: Objection sustained.

4 BY MR. STRAPP:

5 Q All right. Mr. Farber, you heard some testimony
6 that individuals at Lawson consider publications from
7 Gartner, I think that's an industry analyst, to be
8 some of the most reliable industry publications. Is
9 that consistent with your understanding as well?

10 A That's what they said, yes.

11 THE COURT: The question is: Is it
12 consistent with your understanding?

13 THE WITNESS: That Gartner is a widely
14 recognized --

15 Q And reliable publication?

16 A For the most part.

17 Q Is Gartner an industry analyst report that ePlus
18 subscribes to?

19 A We have.

20 Q Have you personally reviewed Gartner research
21 reports and industry analyst reports?

22 A I have.

23 Q I'd like you to turn, please, to Plaintiff's
24 Exhibit 325.

25 A I don't know that I have a 325. Here it is. It's

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1 out of order. Okay. I got it.

2 Q It's also up on the screen for your reference if
3 you want to see a larger version there.

4 A Okay.

5 Q Does this appear, Mr. Farber, to be a Gartner
6 research report?

7 A Yes.

8 Q And is this the type of Gartner research report
9 that you have reviewed in the past?

10 A Yes.

11 Q What's the date of this particular Gartner
12 research report?

13 A This is February 17, 2005.

14 Q What is the title of this report?

15 A Ariba/ePlus settlement could spark more patent
16 lawsuits.

17 Q From reading that title, what do you understand
18 the subject matter of this particular report to be?

19 A On the subject line, it's referring to a
20 settlement agreement that Ariba and ePlus had
21 pertaining to a certain number of our patents, and
22 Gartner, you know, is letting people know that it
23 could potentially result in some more litigation or
24 lawsuits.

25 Q What patents were the subject of this patent

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1 infringement settlement referenced in the Gartner
2 report?

3 A The same ones that are at issue here today.

4 Q The three patents that are at issue in this case?

5 A That's correct.

6 Q All three of those were at issue in this Ariba
7 and ePlus litigation?

8 A Yes, that's correct.

9 Q What is the recommendation here at the second
10 sentence of the first page?

11 A Starting with investigate, investigate the risk of
12 challenges to your products and whether others have
13 infringed on your patents.

14 Q What do you understand that to mean?

15 A They are giving advice, the research analysts --

16 MR. McDONALD: Objection, Your Honor. I
17 don't think the witness can interpret the report.

18 THE COURT: Sustained.

19 Q Let's turn to the next page of the document,
20 please.

21 THE COURT: Ladies and gentlemen, this
22 document is admitted for a limited purpose. Whether
23 or not Ariba and ePlus settled a lawsuit involving the
24 infringement of this case, I mean of the
25 patents-in-suit in this case, is not one of -- is

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1 admitted only for the purpose of whether -- for you to
2 to consider as evidence of whether Lawson knew about
3 ePlus and the patents-in-suit in the case in view of
4 the fact that one of the witnesses from Lawson
5 testified about reviewing the Gartner reports as a
6 regular proposition.

7 You may not conclude from this information
8 that because Ariba thought it might have infringed
9 ePlus' patents and reached a settlement of that matter
10 that Lawson infringes those same patents, but you can
11 consider the evidence of whether Lawson knew about
12 ePlus as a competitor and ePlus' patents, and also in
13 deciding on some of the as, I'll tell you later, some
14 of the defenses that have been offered in the case by
15 Lawson. And those are the limited purposes.

16 Are there any other requests for limiting
17 instruction other than what I just gave?

18 MR. McDONALD: No, Your Honor. Thank you.

19 THE COURT: All right.

20 Q Mr. Farber, I'd like to direct your attention to
21 the bottom of the second page of this Gartner report.
22 Do you see that there are some recommendations listed
23 there in bullet points?

24 A Yes.

25 Q I want you to take a look in particular at the

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1 recommendations for ISVs. Is ISV a term that's used
2 in the supply chain management industry?

3 A It's used in the computer industry.

4 Q What does it refer to?

5 A It means independent software vendors. Those
6 vendors that develop and install software.

7 Q Is ePlus an ISV?

8 A Yes.

9 Q Is Lawson an ISV?

10 A Yes.

11 Q What recommendations is Gartner providing to
12 companies like ePlus and Lawson in this particular
13 Gartner research report?

14 A What Gartner is recommending is to make sure that
15 your innovations are patented, which is the marking
16 that we talked about earlier, and then do an extensive
17 review of the functionality of your software against
18 patents that are known to be in dispute.

19 MR. McDONALD: Your Honor, we don't need this
20 witness to read this document to us. I object.

21 THE COURT: I think that's enough.

22 MR. STRAPP: I have no further ear questions.
23 Thank you for your time, Mr. Farber.

24 THE COURT: Cross-examination.

25

1 CROSS-EXAMINATION

2 BY MR. McDONALD:

3 Q Good afternoon, Mr. Farber.

4 EPlus never gave Lawson any notice of these
5 patents directly before they sued them, did they?

6 A No.

7 Q And so the first time there's a direct
8 communication between ePlus and Lawson is when ePlus
9 filed a complaint and served that complaint on Lawson?

10 A Yes, that's my understanding. That's the way we
11 were instructed to do that.

12 Q That was in May of 2009; is that correct?

13 A I believe that's correct, yes.

14 Q You talked at the beginning of your testimony
15 about some documents that you said put the patent
16 number out there in the public so that the public
17 would see you had these patents numbers. Do you
18 remember that?

19 A I said that we put the information out because it
20 was our understanding that that's how you have to
21 disseminate the patent, and we put it on documents
22 that are publicly available.

23 Q And those documents that you picked as examples of
24 those publicly available documents, those are a couple
25 of exhibits that were put up on the computer monitors

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1 during your testimony, right?

2 A I didn't select them but I think my attorneys did,
3 yes.

4 Q You weren't surprised that they were asking you
5 about those documents, are you?

6 A I'm not surprised at anything.

7 Q So let's put up Exhibit 448 for a moment.
8 Plaintiff's Exhibit 448.

9 A Okay.

10 Q Do you recall this was one of the documents that
11 Mr. Strapp asked you about?

12 A Yes.

13 Q This is one of these examples of these publicly
14 disseminated documents that have the patent number?

15 A Yes.

16 Q Can we blow up -- on the first page of Plaintiff's
17 Exhibit 448, the lower left corner, all the way down
18 to the very bottom of the page, as far as you can go.

19 A Yes.

20 Q Isn't it true, Mr. Farber, that the document that
21 you said was publicly disseminated was, in fact,
22 designated by ePlus, your company, as confidential and
23 proprietary to ePlus, Inc.?

24 A On this it was, but I don't know if this was a
25 brochure, Mr. McDonald, or if it was on our website

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1 screen that gets published.

2 Q Are you saying you have on a website information
3 that would be publicly available that you're going to
4 say that that is confidential and proprietary to
5 ePlus?

6 A It could be.

7 Q Do you actually know what you're talking about or
8 not?

9 THE COURT: Wait a minute. That's not a
10 proper question.

11 But let me tell you-all something. This
12 designation is confidential. All of this. This is
13 something that happened during the lawsuit under a
14 protective order. And what happens is when the
15 parties exchange documents, the lawyers can say they
16 are confidential or certain kind of categories or not.
17 That's how it was put on there.

18 MR. McDONALD: That's only the very bottom
19 one, Your Honor. That's the only one that's in all
20 capitals that was marked --

21 THE COURT: I'm sorry. Anyway. That's what
22 this big thing that says, Confidential, PX 004, page 1
23 of 8 means.

24 Now, he's talking about this section of the
25 first page. Can you highlight that? Proprietary and

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1 confidential, ePlus, Inc. That means that when ePlus
2 put this out to the public, they also put out the fact
3 that it was proprietary and confidential ePlus
4 information. Whatever that means. All right.

5 BY MR. McDONALD:

6 Q Do you see that highlighting here on the screen,
7 Mr. Farber, that proprietary and confidential, ePlus,
8 Inc.?

9 A I do.

10 Q That was a marking that the company put on this
11 document, right?

12 A I would imagine so.

13 Q Then there's another one below that that the Judge
14 was talking about that was done by the lawyers for
15 ePlus in producing this to Lawson?

16 A That's what I heard.

17 MR. McDONALD: So if we look above the
18 highlighting, if we could highlight that paragraph
19 above that, Bill.

20 Q The sentence that begins, All information. So
21 that's in addition to the proprietary and confidential
22 legend from the company. Above that there's actually
23 a paragraph that says, All information contained
24 within this document is confidential and proprietary
25 to ePlus, Inc. Do you see that?

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1 A I do.

2 Q This document wasn't publicly distributed, was
3 it?

4 A I disagree with you. I believe it was.

5 Q What's your basis for believing this document that
6 was designated by ePlus was confidential and
7 proprietary was publicly distributed?

8 A Because I'm familiar with the document, and I know
9 of certain instances of where it was used, and I know
10 that it was freely distributed in certain trade shows
11 and to certain customers, and the information as
12 depicted here is also on our website.

13 Q Well, you mentioned distributing information to
14 customers. Is it true that from time to time you've
15 distributed information to customers, but you want to
16 limit the distribution of it so it doesn't go beyond
17 the customers?

18 A And we usually have a nondisclosure in place for
19 that, yes.

20 Q So this is something that you might have disclosed
21 to a customer with the intent that it not be further
22 distributed to other companies such as Lawson,
23 correct?

24 A No, I don't believe I said that.

25 Q But I'm asking you, isn't it true when you put a

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1 legend like this that it's confidential and
2 proprietary on a document like this describing your
3 product in some detail, really the purpose of it is to
4 go to prospective customers and not to go to your
5 competitors, right?

6 A Customers and prospects.

7 Q That's who you want to see this information. You
8 don't want Lawson to see this, do you?

9 A No more than Lawson would want us to see any of
10 their information, but that's not necessarily why this
11 was marked this way.

12 Q Isn't it true that every page of this document has
13 that proprietary and confidential, ePlus, Inc. marking
14 in addition to the confidential marking that lawyers
15 put on it?

16 A It does.

17 Q Let's go to the other example document that you
18 mention. That was Plaintiff's Exhibit 417, correct?

19 A 417, sure. Okay.

20 Q This is the other example that was put up on the
21 screen during your testimony in answering Mr. Strapp's
22 questions about another example of a publicly
23 distributed document that supposedly was distributed
24 with the patent English, right?

25 A That's correct.

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1 Q Now, if we go down again to the lower left corner
2 of this document, we see the exact same confidential
3 and proprietary legend here again, don't we?

4 A We do.

5 Q It's the ones from the lawyer and also the ones
6 from the company, right?

7 A It appears to be, yes.

8 Q If you thumb through every page of this exhibit
9 417, you'll see that the company again put on its own
10 proprietary and confidential ePlus, Inc. destination
11 on every one of those pages that you say was publicly
12 disseminated, right?

13 A Yes, I do.

14 Q Just to be clear, I didn't pick these examples,
15 right, Mr. Farber? It was your lawyers who picked
16 these examples of the marked documents?

17 A That's correct.

18 Q Isn't it true that you actually go out of your way
19 to make sure that your customers don't talk -- excuse
20 me.

21 THE COURT: Wait just a minute. I'm confused
22 about something at least with these two exhibits. Are
23 these exhibits, were they made available to people
24 like Lawson or were they made available only to your
25 potential customers?

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1 THE WITNESS: I don't know. I guess they are
2 provided to Lawson in discovery, Your Honor.

3 THE COURT: No, no. I don't mean that. I
4 mean in the business world, the world you function in
5 with all this proprietary on here, etc., etc., in your
6 previous testimony, were these documents ever
7 distributed to your competitors or were they limited
8 in distribution to people with whom you were hoping to
9 do business, your customers?

10 THE WITNESS: They were distributed to
11 prospects, those that we were hoping to sell our
12 solutions to as well as being on our publicly
13 available website.

14 THE COURT: So it's on your website, but if
15 you distributed the documents, you distributed them
16 not to competitors, you gave them to your prospects;
17 is that right?

18 THE WITNESS: That's correct, yes.

19 THE COURT: And anybody can go to your
20 website; is that right?

21 THE WITNESS: Absolutely, correct.

22 BY MR. McDONALD:

23 Q There's no designations on these exhibits that
24 we've been looking at, Mr. Farber, 417 or 448, that
25 indicate they were actually something that was on your

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1 website, is it?

2 A No, I'm saying that from my personal knowledge.

3 Q These indicate they were dated September 2007. Do
4 you see that?

5 A Yes, I do.

6 Q Are you saying this was on ePlus' website in
7 September of 2007?

8 A Yes, I am.

9 Q Do you know that because in September of 2007 you
10 have a memory as you sit here today that these
11 particular documents were on ePlus' website?

12 A I could tell you that the component of our website
13 that has these documents has not been altered. So
14 this information as you see it is going to be on our
15 website today.

16 THE COURT: It has not been altered since
17 when, sir?

18 THE WITNESS: Since the publication, 2007.

19 Q Now, has ePlus actually issued any press releases
20 regarding the issuance of any of the three patents in
21 this suit?

22 A I'm sorry. Can you repeat that?

23 Q Are you aware of ePlus issuing any press release
24 about the issuance of any of the three patents
25 involved in this case?

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1 A The issuance of the patents?

2 Q Yes.

3 THE COURT: Do you know what that means?

4 THE WITNESS: It means when the Patent
5 Office --

6 THE COURT: Yeah, when the Patent Office
7 issued the patents, at that time did ePlus issue any
8 press releases?

9 THE WITNESS: I'm not aware of the issuance.
10 Most of the issuance or some of them, I think, might
11 have been before my time at ePlus. So I don't know.

12 Q The third one was still pending when ePlus
13 acquired these assets, right?

14 A I believe it may have. I don't recall.

15 Q Well, you were actually involved with a press
16 release about that third patent, weren't you?

17 A May have been. I don't recall.

18 Q Isn't it true that the third patent is the '172
19 patent, correct?

20 A Yes, that's correct.

21 Q That's the one claim that doesn't have the word
22 "catalog" actually literally in the claim asserted
23 here?

24 A I think that's the one that says "database"?

25 Q Yes.

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1 A Yes.

2 Q Okay. Isn't it true that you were actually quoted
3 in a press release about that patent issuing that
4 called that patent a patent on electronic cross
5 catalog searching?

6 A I may have. I'd have to see the press release. I
7 don't recall what was said.

8 MR. McDONALD: May I approach, Your Honor?

9 MR. STRAPP: Objection, Your Honor. This is
10 beyond the scope of my direct. I never got into
11 press releases. I never talked about the subject
12 matter of the '172 patent.

13 THE COURT: Can I see it?

14 MR. McDONALD: We just got through talking
15 about how they publicly disseminated information about
16 their patents. That's what I'm asking about here.

17 THE COURT: I think he didn't ask about the
18 '172 patent, but he did ask about public information,
19 public dissemination of the '172 patent by virtue of
20 what is on Exhibit 417 and 448. So the objection is
21 overruled.

22 BY MR. McDONALD:

23 Q Mr. Farber, you have been handed now --

24 THE COURT: Did you give it to him?

25 MR. LANGFORD: Yes.

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1 Q You've been handed now an Exhibit entitled, "ePlus
2 awarded patent on electronic cross catalog searching,"
3 do you see that?

4 A Yes.

5 THE CLERK: Does it have a number?

6 MR. McDONALD: No, it should be numbered.

7 Can we get a sticker so we can mark this?

8 THE COURT: Are you offering it as an
9 exhibit?

10 MR. McDONALD: I think I will be offering it
11 as an exhibit, Your Honor, once he has a chance to
12 look at it.

13 MR. STRAPP: No objections, Your Honor.

14 MR. McDONALD: We'll designate it as DX 400.

15 THE COURT: All right.

16 BY MR. McDONALD:

17 Q So, Mr. Farber, do you recognize what's been
18 marked now as Exhibit 400 as a press release that
19 ePlus issued when it got that '172 patent, that third
20 patent?

21 A Yeah, I mean vaguely I recall it, yes.

22 MR. McDONALD: I think I heard "no objection"
23 before I even offered it, but I would offer up
24 Plaintiff's Exhibit 400, Your Honor.

25 THE COURT: It's admitted without objection.

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1 MR. McDONALD: Thank you.

2 (Plaintiff's Exhibit 400 is admitted into
3 evidence.)

4 BY MR. McDONALD:

5 Q So this relates to the patent No. 6,505,172 as you
6 can see in that second paragraph, right?

7 A That's correct.

8 Q That's the patent with the one claim that's
9 asserted in this class that doesn't use the word
10 "catalogs," right?

11 A That's correct.

12 Q In that paragraph, in the press release, and you
13 personally are quoted in this press release down in
14 the fourth paragraph, correct?

15 A That's correct.

16 Q In the second paragraph, it says that that patent
17 "covers ePlus' technology for searching multiple
18 catalogs from different suppliers simultaneously,
19 checking inventory availability, and transferring
20 information on selected items to generate purchase
21 orders in an e-Procurement purchasing ERP or
22 accounting system," correct.

23 MR. STRAPP: Objection, Your Honor. We don't
24 object to this document for purposes of notice and for
25 purposes that the patent is publicly available, but we

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1 do object to the extent that this question calls for a
2 claim interpretation. It calls for a legal
3 conclusion. It goes beyond the scope of direct as to
4 the interpretation of the patents claims.

5 MR. McDONALD: I'll take it a step at a time,
6 Your Honor, but I think this has to do with the
7 message they were sending out. He's been testifying
8 about what the message was about their patent.

9 THE COURT: I know it has to do with the
10 message because it's a press release, but that doesn't
11 respond to the objection.

12 MR. McDONALD: Well, it responds to how they
13 are representing their patent out there to the public,
14 and if they are trying to say that Lawson should have
15 been an aware of publicity and realized they had a
16 problem here, I think I'm entitled to show that they
17 were telling the world these patents had to do with
18 cross catalog searching.

19 MR. STRAPP: Your Honor, the quote that Mr.
20 McDonald is reading from is a quote from Mr. Farber
21 describing the product, not the patents. Furthermore,
22 it's irrelevant what Mr. Farber's interpretation of
23 the patent claims are. That's already been decided,
24 Your Honor, and there's no need for him to testify
25 about that.

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1 THE COURT: I think it's confusing and leads
2 to the development of collateral issues which will be
3 further confusing. So the objection is sustained to
4 the question.

5 MR. McDONALD: You can take that off the
6 screen, I guess, at this point, then we'll move on to
7 other topics here.

8 BY MR. McDONALD:

9 Q You were here when Ms. Marion testified as the
10 first witness of ePlus, right?

11 A Yes.

12 Q Would you agree that just before ePlus sued
13 Lawson, this division that you're responsible for that
14 has the e-Procurement software, had a big \$4 million
15 write-down of its goodwill valuation because its sales
16 were going down?

17 MR. STRAPP: Objection, Your Honor. This is
18 beyond the scope of my direct. It doesn't have
19 anything to do with the issues of infringement. This
20 witness will be called back for in validity related
21 issues, but this is beyond the scope of this
22 particular part of the case.

23 THE COURT: I've already ruled on that topic.
24 It was something that needs to be dealt with in
25 invalidity, and he didn't open it up by what he did.

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1 You shouldn't have asked that question. Sustained.

2 BY MR. McDONALD:

3 Q In the SCC disclosures in early 2009, there was no
4 identification of Lawson as a competitor or an
5 infringer or any cause of any harm to ePlus, correct?

6 A I think that's what Elaine Marion testified to.

7 Q I'm asking for your testimony, Mr. Farber.

8 A Then repeat the question because you confused me.

9 Q All right. Isn't it true that in early 2009, just
10 before you sued Lawson, the disclosures to the SCC
11 regarding the write-down and the value of your
12 division said nothing about Lawson as a competitor?

13 MR. STRAPP: Objection. I move to strike the
14 question.

15 THE COURT: Sustained. If you do it again,
16 there will be other consequences. You can get into
17 that in the other area.

18 BY MR. McDONALD:

19 Q Mr. Farber, I'd like to turn then to what you were
20 saying about competition with Lawson and you mentioned
21 some specific customers.

22 Isn't it true that for some of the customers you
23 listed, they already had Lawson systems in place and
24 you were competing for some additional business with
25 those customers?

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1 A On one or two of them I understand that they had a
2 Lawson procurement system in place that we were both
3 responding to the requirements of interfacing with
4 that system as well as potentially replacing that
5 system over time.

6 Q Isn't it true that Cleveland Clinic was the
7 company that you're you talking about or at least one
8 of them?

9 A That wasn't one that immediately came to mind, but
10 yes.

11 Q Who did you have in mind when you said there was
12 at least one?

13 A I think it was Novant. I know that Novant and
14 Cleveland Clinic were both customers of the
15 procurement solution.

16 Q So your understanding is that both Novant and
17 Cleveland Clinic had the purchase order, requisition,
18 and inventory control modules from Lawson?

19 A I can't say that.

20 Q When you say "procurement," what is your
21 understanding as to what the Lawson procurement
22 product would have been?

23 A I didn't look at it that way. I looked at the
24 functionality that they were requesting and talking to
25 us about, and if they were utilizing that

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1 functionality and said they were utilizing that
2 functionality of the Lawson system, I didn't equate
3 them to a specific product name. I equated them to
4 the functionality that both products were generally
5 equivalent, and you were already in there, and I was
6 potentially trying to displace you or displace Lawson.

7 Q Isn't it true that actually for Cleveland Clinic,
8 the issue that Cleveland Clinic had sent out a request
9 for bids on wasn't to replace the Lawson system, it
10 was to add some catalog functionality to the Lawson
11 system?

12 A It was a two-step approach with Cleveland Clinic
13 and I received personal emails from Cleveland Clinic
14 that said initially that they wanted to evaluate both
15 our catalog capabilities to help them populate a
16 Lawson system with vendor catalogs, and then also to
17 learn more about our general procurement solution.
18 And that led my sales organization to talking to them
19 down the road about a potential replacement. So it
20 was going to be a two-step sales approach.

21 Q But what Cleveland Clinic had, they already had
22 Lawson Punchout, didn't they?

23 A I don't know.

24 MR. McDONALD: Can we put up Defendant's
25 Exhibit 45, which already is admitted.

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1 A I'm sorry. Which one?

2 Q Defendant's Exhibit 45.

3 THE COURT: It's not in your book.

4 MR. McDONALD: I can give you a paper copy
5 while we're putting it up.

6 Can we blow up the text down to the signature
7 block, I guess.

8 BY MR. McDONALD:

9 Q Mr. Farber, while they are doing that, do you
10 recognize Exhibit 45 as an email regarding a Lawson
11 meeting?

12 A Yes, that's what it looks like for sure. Yes.

13 Q This was an email I showed to you back in December
14 of 2009 at your deposition, right?

15 A I don't recall it, but if you say so, I'll agree
16 with you.

17 Q You see there's a little sticker there that looks
18 like it has the Exhibit Lawson 36 on it down there?
19 Above the yellow sticker, there's a white sticker?

20 A Yes.

21 Q And it's got Lawson 36 and then 12-17- and I'm
22 going to interpret that next number 09?

23 A I see that, yes.

24 Q I understand that's awhile ago, but do you
25 remember having to do a deposition in this case back

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1 in December of '09?

2 A Yes, I do.

3 Q This document is an ePlus email, correct? These
4 are ePlus employees?

5 A Yes, they are.

6 Q And this had to do with Cleveland Clinic, correct?

7 A It appears to be.

8 Q That's what the initials CCF -- does that stand
9 for, is it Cleveland Clinic Foundation?

10 A I believe so.

11 Q And this is in February of; 08, correct?

12 A Yes.

13 Q Now, this Lawson meeting, do you have an
14 understanding as to what exactly that means as the
15 topic of this email?

16 A No, I don't.

17 Q But you did review it over a year ago, and you
18 have had every chance to review that, correct?

19 A Yeah, I guess. Sure.

20 Q And you recall that back in December when you were
21 deposed, you were deposed as a witness designated on
22 behalf of ePlus to talk about issues including
23 competition?

24 A Sure.

25 Q So if we take these notes from the Lawson meeting

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1 here, I'll start with No. 1, they are no bidding this
2 RFP as they do not have the catalog services
3 necessary. Do you see that line?

4 A I do.

5 Q Do you understand that Lawson wasn't bidding for
6 that Cleveland Clinic catalog business in terms of
7 Lawson representing that it had the additional catalog
8 services Cleveland Clinic was seeking to add to the
9 Lawson system, right?

10 A I can't universally say that. You're implying
11 that it's Lawson. It says "notes from Lawson
12 meeting," and you're implying that "they" means Lawson
13 specifically no bidding. I don't know what -- you'd
14 have to refresh my memory and we'd have to go back
15 and look at all the requirements that were in that bid
16 so I can know precisely what it is that they are
17 looking for.

18 Q Do you see any information in this email that
19 would indicate that the "they" that's being referred
20 to in point No. 1 under the title "notes from Lawson
21 meeting" is somebody other than Lawson?

22 A They could have had an internal meeting between
23 Drew Buford, Paul Jarboe and Jay Raulerson to discuss
24 Lawson. That doesn't mean that Lawson was physically
25 at the meeting.

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1 Q But somebody may have gotten information that
2 indicated that Lawson wasn't bidding for the catalog
3 services, right?

4 A I wouldn't know that.

5 Q But you did testify as the corporate
6 representative on competition issues including this
7 document?

8 A I'm not on the document. I'm not copied on the
9 document, and I'm telling you to the best of my
10 knowledge I don't know.

11 Q Now, do you see on point No. 2 there, it indicates
12 that all of CCF currently uses Lawson's requisition
13 self service. Do you see that?

14 A I do.

15 Q It goes on from there, but I just want to focus
16 the requisition self service. That's something we've
17 heard testimony about in this case, that RSS module?

18 MR. STRAPP: Objection. There's been no
19 foundation laid for this specific type interpretation
20 testimony that Mr. McDonald is seeking about this
21 document. Lack of foundation.

22 THE COURT: Sustained. It says Lawson
23 meeting. We haven't even established that it was a
24 meeting with Lawson. Basically, he doesn't know
25 anything about the document is what it sounds like.

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1 So if you can establish a foundation that he knows
2 what's in it and what's talked about, that's one
3 thing, but otherwise, let's move on to something else.

4 BY MR. McDONALD:

5 Q Had Cleveland Clinic indicated that they were
6 going to stay with Lawson's requisition self service
7 but use the ePlus catalog, would ePlus have found a
8 way to accommodate Cleveland Clinic and integrate
9 their catalog functionality with Lawson's requisition
10 self service?

11 MR. McDONALD: Objection. Calls for
12 speculation.

13 THE COURT: It starts with if, right?

14 MR. McDONALD: It starts with "had."

15 THE COURT: Huh.

16 MR. McDONALD: Had Cleveland Clinic indicated
17 that.

18 THE COURT: "Had" meaning the same thing as
19 "if." Sustained.

20 BY MR. McDONALD:

21 Q Now, is it true that --

22 MR. STRAPP: Your Honor, could I ask that
23 document be taken off the screen? Thank you.

24 BY MR. McDONALD:

25 Q Did ePlus have some discussions with Lawson

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1 specific to Cleveland Clinic to determine whether or
2 not they could integrate their products with Lawson's
3 product and represent that to Cleveland Clinic?

4 A We may have.

5 THE COURT: Do you know that?

6 THE WITNESS: I don't know that.

7 THE COURT: Then say "I don't know." Don't
8 be guessing. It helps the jury to know what you know,
9 not what might have happened. Or if you're saying it
10 may have, and I have a vague recollection of it, then
11 say something like that, but don't guess, Mr. Farber.

12 THE WITNESS: Okay. I don't know at this
13 time.

14 BY MR. McDONALD:

15 Q But you're aware of situations where ePlus has
16 integrated its product with Lawson products, right?

17 A With their accounting and human resource products,
18 yes.

19 Q I think you mentioned before, though, that
20 Cleveland Novant was something that you're aware of
21 that -- I'll withdraw that question.

22 So you have made that effort, though, to integrate
23 ePlus' products with Lawson's software before?

24 A We have integrated our solutions at several of our
25 clients, and we've interfaced our procurement

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1 solutions and catalog solutions with Lawson's human
2 resource and accounting software.

3 Q In the course of these efforts to integrate with
4 Lawson, have you ever had any communications with
5 Lawson before you sued them that related at all to the
6 patents in this case?

7 MR. STRAPP: Objection, asked and answered.

8 THE COURT: Sustained. Well, actually, no
9 because he said he didn't notice of the patents. It
10 sort of overlaps.

11 But have you ever discussed the subject of
12 the patents with Lawson before the suit was initiated
13 is the question.

14 THE WITNESS: No.

15 MR. McDONALD: I'm just checking my notes
16 here, Your Honor. I think I'm close to done if I
17 could have a moment.

18 BY MR. McDONALD:

19 Q Mr. Farber, you don't have any personal knowledge
20 that anybody from Lawson ever actually saw an ePlus
21 product of any kind, right?

22 A I'm sorry. Can you repeat that? I didn't hear
23 you.

24 Q Sure. You don't have any personal knowledge that
25 any employee of Lawson has ever seen an actual ePlus

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1 product, right?

2 A I don't have any personal knowledge, no.

3 Q Are you aware of any corporate knowledge at ePlus
4 that would indicate that Lawson personnel had ever
5 actually seen an ePlus product?

6 A Not that I'm personally aware of.

7 Q On this integration issue, is it true that ePlus
8 does represent that its products that have catalog
9 content can be integrated with other companies'
10 procurement products?

11 A Repeat that question.

12 Q Okay. Is it true that ePlus does represent to
13 potential customers that its products relating to
14 content, catalog content, can be integrated with
15 software systems from other companies?

16 A Not necessarily. We don't provide catalog
17 content. We have tools that will work with content
18 and enable it to be populated into other systems.
19 That's what we represent. We don't provide a catalog
20 that has content prepopulated.

21 Q Finally, I do have one more thing. You talked
22 about that research report, plaintiff's Exhibit 463
23 from AMR. Do you recall that?

24 A Yes.

25 MR. McDONALD: Can we pop up Plaintiff's 463,

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1 please. I just wanted to go to the page -- I think
2 it's page 15 of the document, Bill.

3 BY MR. McDONALD:

4 Q And for you, Mr. Farber, it's got the number 6144
5 in the lower right corner.

6 THE COURT: The pie chart?

7 MR. McDONALD: It's a pie chart, that's
8 right. Figure 2.

9 Q Do you see that pie chart, Mr. Farber?

10 A I do.

11 Q This is a document you said you reviewed and
12 understood, correct?

13 A That's correct.

14 Q So figure 2, it said that's for top 10 procurement
15 and sourcing vendors by 2005 total revenue share,
16 right?

17 A Yes.

18 Q Do you see there that Lawson has got a 3 percent
19 slice in the lower right side about five o'clock?

20 A I see that.

21 Q Is ePlus anywhere on the pie?

22 A No. I'm sure it would be considered in the
23 "other" category.

24 Q Can we turn to the next page of figure 2A? That's
25 another pie chart, correct?

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1 A Yes.

2 Q This is for procurement and sourcing hosting
3 revenue share, 2005, correct?

4 A That's correct.

5 Q What is your understanding as to what that's
6 talking about with the word "hosting"? "

7 A That's trying to depict or estimate the vendors
8 that are in the procurement and sourcing that offer
9 procurement and sourcing systems, where they rank
10 relative to those companies providing hosting
11 facilities to their customers, which I think we heard
12 what hosting was a few days ago.

13 Q Would hosting, would that include hosting catalog
14 content?

15 A Would it mean hosting catalog content?

16 Q Would it include it?

17 A It could. It could be a data center that anything
18 that the customer is running or licensed to use would
19 be in that hosting facility. It wouldn't be owned by
20 any of these companies. It would be maintained.

21 Q You're just managing and maintaining the content?

22 A No, that's not what this is saying. This is
23 maintaining the system, the application, the server it
24 runs on, the network that it belongs to, how an end
25 user would access it remotely. It has nothing to do

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1 with the underpinnings of the operation of the
2 software and the administration of it.

3 Q So does it have anything to do with managing the
4 content itself that the customer may be using?

5 A No, I don't believe that's the case here.

6 Q Do you know if that's generally true for when
7 computer companies do hosting services?

8 A I don't know if that's true or not.

9 Q On this particular pie chart, ePlus is there with
10 about 4 percent at about five o'clock on the chart,
11 right?

12 A That's correct.

13 Q Lawson is nowhere to be seen on this chart, right?

14 A I would image they'd fall in the "other
15 procurement" catagory.

16 Q We saw them on figure 2 where ePlus wasn't and we
17 don't see them on figure 2A where ePlus is, right?

18 A Well, they are two different charts describing two
19 different scenarios.

20 MR. McDONALD: I have no further questions.

21 THE WITNESS: Thank you.

22 MR. STRAPP: We're going to put that back up.

23 THE COURT: ELMO back to the duty form.

24

25

1 REDIRECT EXAMINATION

2 BY MR. STRAPP:

3 Q I'm going to ask Lawson to put back up on the
4 screen the press release that was shown to you,
5 Mr. Farber.

6 Mr. Farber, what's the purpose of ePlus' press
7 releases generally? Why does ePlus issue press
8 releases?

9 A A press release is issued to, you know, let the
10 industry know what's going on at ePlus and what we
11 think are notable events.

12 Q Do you see at the top of this document there's a
13 date, July 21, 2003? Do you see that?

14 A Yes.

15 Q Right above it, it says "market wire." What's
16 your understanding of market wire? What does that
17 imply about where this was disseminated to?

18 A Market wire is a public relations organization
19 that picks up will press releases and then
20 redistributes them on their own vehicles of
21 communication.

22 Q So who would have been the target audience of a
23 press release about ePlus' patent and the subject
24 matter of the patent?

25 A Well, it would have had a very broad distribution.

FARBER - REDIRECT

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1 Certainly, you know, to ISVs and certain customers
2 that look at the releases. The financial world as
3 well.

4 Q This press release specifically mentions one of
5 the patent numbers that's at issue in this case,
6 doesn't it? The '172?

7 A Yes.

8 Q You were asked a few questions by Mr. McDonald
9 regarding marking. Do you recall that?

10 A Yes.

11 Q Does ePlus mark any of its products or patent
12 literature that is disseminated publicly without
13 restriction?

14 A Yes.

15 Q Which particular --

16 MR. McDONALD: Objection. This is already
17 covered.

18 THE COURT: Overruled.

19 Q Which particular products or product literature
20 are marked with a patent that aren't restricted in any
21 way?

22 A Sales brochures, sales presentations that are
23 provided at either a prospect's or industry conference
24 that we speak at.

25 Q Trade shows?

FARBER - REDIRECT

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1 A Trade shoes. Information that's, you know, widely
2 available and nonrestricted on our websites.

3 Q For example, at an industry trade show, can anyone
4 walk up, take a product brochure and walk away?

5 A Absolutely.

6 Q Can anyone go to the ePlus website and see the
7 patent numbers marked there?

8 A Yes.

9 MR. STRAPP: No further questions.

10 THE COURT: All right. You may step down,
11 sir.

12 (The witness was excused from the witness
13 stand.)

14 MR. ROBERTSON: Your Honor, we have a few
15 housekeeping matters to take care of, a few
16 stipulations to read into the record. If you'd like,
17 I can do that now.

18 THE COURT: The lunches are here. I think
19 I'll let you-all clean up and get things straightened
20 out. We'll take one hour for lunch. You can take
21 your notebooks with you.

22 (The jury is out.)

23 THE COURT: Do you have something,
24 Mr. Robertson, you wanted to give me that I had asked
25 for or something and I told you to do it after the

1 examination at the break?

2 MR. ROBERTSON: Yes, sir. Two thinks, Your
3 Honor. The first issue had to do with this deposition
4 destination of that was Kristy Oliver.

5 THE COURT: And the issue there was whether
6 Lawson had designated that part of it on item No. 18,
7 page 29, as a fairness designation or whether you had
8 designated it.

9 MR. ROBERTSON: Yes, sir, and we have the
10 answer to that question.

11 THE COURT: And the answer is?

12 MR. ROBERTSON: It was Lawson. And let me
13 direct you to where you can find it.

14 THE COURT: Do you all agree?

15 MR. SCHULTZ: Yes.

16 THE COURT: All right.

17 MR. McDONALD: It was ePlus' counsel that
18 asked it during the actual taking of the deposition,
19 but we at Lawson actually designated it for the
20 reading.

21 THE COURT: All right. The fact that ePlus
22 asked it but didn't offer it doesn't change the
23 fundamental issue, and that is who opened the door at
24 the trial. So this doesn't open the door.

25 MR. McDONALD: We put it in without their

1 objection, Your Honor, and their cross designation.

2 THE COURT: All right. It's in without
3 objection. How do you deal with that now? You have
4 let it in without objection.

5 MR. ROBERTSON: No, Your Honor. I don't know
6 if we objected or not. Our objection might have been
7 overruled.

8 THE COURT: Well, then you better check that
9 out, too, because if it's overruled, that's a
10 different issue. If you didn't open the door, they
11 did.

12 MR. ROBERTSON: I will look into that, Your
13 Honor.

14 THE COURT: Yes.

15 MR. ROBERTSON: With respect to this issue
16 about the published by a vendor, we have collected a
17 number of documentation that involved both the Markman
18 hearing the subsequent motion in limine we had with
19 respect to proffering new constructions of any claim
20 terms outside of the Court's construction, the
21 discussions we had at the final pretrial conference.

22 THE COURT: Have you tabbed them?

23 MR. ROBERTSON: It's tabbed and highlighted,
24 Your Honor.

25 THE COURT: So I can read it fairly quickly.

1 MR. ROBERTSON: I've provided it to Mr.
2 McDonald.

3 MR. McDONALD: I thought you asked us to try
4 to get together and agree on a joint appendix of these
5 materials.

6 THE COURT: I thought that's what this it
7 was.

8 MR. ROBERTSON: He has it.

9 THE COURT: He may want to add to them.
10 That's the point.

11 MR. McDONALD: We should be able to work it
12 out over lunch.

13 THE COURT: I'm sure you can. But if you
14 work it out early, then I can look at it.

15 MR. ROBERTSON: Your Honor, I think when we
16 return from lunch, I'll just confirm with my
17 colleagues, there's just some issues we need to take
18 up with respect to some exhibits that were to the
19 Frank videotape deposition that was played, and then
20 there are about four or five stipulations I'd like to
21 read into the record.

22 THE COURT: I didn't know about the Frank
23 deposition. What are you talking about?

24 MR. STRAPP: Your Honor, we just wanted to
25 identify for the record the exhibits that were

1 referenced during the playing of the Frank deposition.

2 THE COURT: All right. You mean they were
3 used and admitted in the depositions. You just want
4 to put the trial exhibit numbers on there?

5 MR. STRAPP: Correct, Your Honor.

6 THE COURT: Okay. You-all can work that out.
7 And then you're going to rest. Is that it?

8 MR. ROBERTSON: Yes, I believe so, Your
9 Honor.

10 THE COURT: What do you mean?

11 MR. ROBERTSON: I don't have any other live
12 witnesses.

13 THE COURT: I was waiting for rest of the
14 answer. Okay. We'll take an hour for lunch.

15 (Luncheon recess taken.)
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